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**POSITION STATEMENT
OF THE STATE TENURE COMMISSION
ON TENURE REFORM**

The State Tenure Commission supports tenure reform and to that end wishes to provide the following information for the Senate Education Committee as it considers the Teacher Quality bills. Our discussion begins with a brief history of the Tenure Act, relevant to the tenure reform bills, that will provide the basis for our comments that follow. Next, we present our concerns about certain provisions of the reform bills. We then offer our suggestions for tenure reforms. Finally, we include summaries of the tenure cases cited in the House Education Committee meetings to provide a better understanding of those cases.

History of the Tenure Act

Before the major amendments to the Tenure Act in 1993, the local board held a hearing in tenure matters and the board's decision could then be appealed to the State Tenure Commission, which held another hearing. The Commission's decision could be appealed to the county circuit court, then to the Michigan Court of Appeals and, finally, to the Michigan Supreme Court. There were virtually no time lines and cases could linger for years.

The 1993 amendments eliminated the local board hearing (a move that was not opposed by local boards, whose members were often called upon to preside over hearings late at night or on weekends and whose decisions on occasion resulted in significant dissension in their local communities) and the appeal to the county circuit court. Strict deadlines were imposed for every step of the appeal process, resulting in significantly reduced times in resolving tenure appeals. As a result, ***the local board now only votes on whether to proceed on charges, without having the benefit of an evidentiary hearing in making its decision.***

It is not until the charges are appealed to the Tenure Commission that the ***only evidentiary hearing is held.*** The evidence presented at the hearing may not support some or all of the board's charges (as is illustrated by the Davis case discussed below), and the Commission must have the authority to arrive at a decision which is consistent with the evidence and to determine an appropriate penalty based on the ***proven charges.***

Concerns Regarding Pending Tenure Reform Bills

1. Arbitrary and Capricious Standard of Review

It has been proposed that the "reasonable and just cause" standard in the Tenure Act be replaced with an "arbitrary and capricious" standard. The proposed standard cannot be understood by a simple reference to the common dictionary definition of the terms "arbitrary and capricious". Rather, the courts have construed the arbitrary and capricious standard of review as a much lower standard of review that is highly deferential to the original decision maker, in this case, the local board. For the reasons explained above, it would be highly inappropriate for the Commission to defer to a decision by the local board made without an evidentiary hearing and, in some cases, the local board's decision could be in opposition to the facts proven at an evidentiary hearing. Moreover, it would violate section 76 of the Administrative Procedures Act, MCL 24.276, which requires all evidence in a case to be made a part of the hearing record and states that "other factual information or evidence shall not be considered in determination of the case." It also would raise serious due process concerns. The "reasonable and just cause" standard allows maximum flexibility in determining possible reasons for discipline and in assessing the appropriate level of discipline. In addition, the necessary deference, required by the proposed standard, to the local board's decision would overturn decades of appellate court precedents that hold that the Commission's decision is without such deference.

2. Modification of the ALJ's Preliminary Decision

The reform bills would remove the present ability of the Commission to modify the preliminary decision and order of the Administrative Law Judge. In 1990, the Michigan Supreme Court held that the State Tenure Commission has the necessary authority to modify the penalty imposed by a local school district in tenure matters. The Court said that it was not reasonable to require the Commission to have to reinstate a teacher with back pay without imposition of any discipline where the Commission found that misconduct charged by the district was proven, but that the discipline imposed by the board was excessive or not reasonable. That case, which was decided before the 1993 amendments, applies with even more force today because the local board no longer has the benefit of an evidentiary hearing on which to base its charges and recommended penalty.

Absent the authority of the Commission to modify the penalty, inequities would occur. If the Commission were to find based on the evidence before it, that only one of several of the board's charges was proven, it would be faced with the dilemma of reinstating the teacher, even though some misconduct had been proven, or of upholding the board's penalty, which was based on the assumption by the board that multiple infractions had occurred and, accordingly, may not be appropriate under the circumstances.

The Michigan Court of Appeals has held that an agency (in this case, the Tenure Commission) makes the final decision and order in a contested case and that the ALJ's decision is merely a recommendation or proposal for the agency to consider. In addition, the ALJ is not even an employee of the Michigan Department of Education and not necessarily an expert in the area of education law. (The ALJ is an employee of the Michigan Administrative Hearings Services housed in the

Department of Licensing and Regulatory Affairs.) In contrast, the State Tenure Commission is a gubernatorially appointed body, two of whom are classroom instructors, one a member of a board of education, one a superintendent of schools and one not a teacher or a member of a board of education, recognized as possessing expertise in tenure matters. (It is ironic that two of the cases submitted by the board attorneys, who testified before the House Committee on Education in this matter, as examples of alleged irrational findings by the Commission were in fact decisions by the ALJ and not the Commission. See the Flowers and Davis cases noted below.)

3. Evaluations Based on MCL 380.1249

The underpinning of the tenure reforms is grounded on the evaluation assessment of § 1249 of the Revised School Code. The current § 1249 provides only a skeletal framework of the evaluation process. It is our understanding that the evaluation process has yet to be developed and will require a pilot period and sufficient time for implementation. Under Colorado's tenure reform legislation, upon which the Michigan bills are modeled, the effectiveness evaluation system is being developed and implemented over a three year period. It will not even be considered in determining tenure status until the 2014/2015 school year and the first time that performance evaluations will result in teachers earning or losing non-probationary status will be 2016. If enacted in Michigan, the reform bills would account for significant changes immediately.

(See: <http://www.cde.state.co.us/EducatorEffectiveness/EvaluationAndSupport.asp>).

In addition, the reform bills would result in a teacher losing tenure and a teacher losing his or her job after two years of ineffective ratings under § 1249. Michigan Department of Education assessment experts have said, however, that it will require a minimum of three years of data to eliminate extraneous causes and to conclude that a teacher's performance is ineffective. Considering the very serious ramifications to a teacher's current job and to any future career in teaching after having been rated "ineffective," it is vital that the underlying data be solid.

4. Due Process Concerns

Additional due process concerns are raised by the proposal to remove tenure from tenured teachers who are rated as ineffective without providing a hearing. Due process issues may also be raised by the proposal to suspend the salary of a teacher against whom charges are pending before a decision has been made on the charges following an evidentiary hearing. The Michigan Court of Appeals, the Michigan Supreme Court, a Michigan federal district court and the U.S. Court of Appeals for the circuit that includes Michigan have all recognized that teacher tenure in Michigan is a property right protected by constitutional due process requirements. An alternative to address due process concerns that may result from removal of tenure from a teacher as a result of ineffective ratings would be to provide a statutory rebuttable presumption of reasonable and just cause for discharge where a teacher has been rated as ineffective a sufficient (as determined by assessment experts) number of times, similar to the rebuttable presumption for teachers convicted of certain crimes. A teacher would then have the responsibility to present evidence rebutting the presumption in a hearing, which satisfies the due process requirement missing in the bill. (See MCL 380.1535a).

5. Removal of the Presumption of Satisfactory Service

One of the many benefits of the 1993 amendments to the Tenure Act was the requirement, for the first time in Michigan, of teacher evaluations, both for probationary and tenured teachers. The Tenure Act requires that a teacher receive an individualized development plan (IDP), at least two classroom observations and a final year-end evaluation based on an assessment of the teacher's progress in meeting the IDP goals. We are concerned that the proposal to remove the penalty for districts failing to comply with these requirements (i.e., a presumption of satisfactory service) will remove the incentive for districts to comply with this beneficial statutory requirement. These evaluation requirements are above and beyond statutory evaluation requirements contained in § 1249 of the School Code. We believe that the tenure evaluation requirements should be maintained and that they should be tied in with § 1249 requirements to avoid multiple evaluations by school districts. The presumption of satisfactory service for failure of a district to comply with tenure evaluation requirements could be made contingent upon the attainment of an acceptable effectiveness rating under § 1249. Also, it is not clear what would happen if a district fails to provide the proposed mandate of three § 1249 evaluations, necessary for a teacher to earn tenure. To avoid having a teacher being placed in a state of indefinite probation, a district should have an incentive/penalty to encourage compliance with the § 1249 requirements.

6. Dismissal following Certification/Endorsement Nullifications

The Revised School Code allows a teacher to request the State Board of Education (SBE) to nullify an endorsement on his or her teaching certificate or a grade level certification if either has not been used for more than 12 years. HB 4625 would permit a district to dismiss such a teacher, without a hearing, if the district does not have an available position open in the teachers' current certification or if the position to which the district wants to assign the teacher is a position requiring the endorsement or grade level certification that was previously nullified by the teacher. If the district no longer has a position available in the teacher's area of certification, it can simply lay off the teacher who would then have a limited right to recall if such a position later becomes available. If the district has a position open in which a teacher is otherwise certified, a district should not be allowed to summarily dismiss that individual based on that person's exercise of a statutory right. The SBE has recognized, and the Legislature has codified, that a teacher should be allowed to nullify an endorsement or grade level certification if it has not been used in a certain amount of time. The logic is that a person may no longer be qualified to teach in an area after such a lengthy absence from teaching in that area. (The language in HB 4625 regarding lapsed certificates is unnecessary because a teacher loses tenure rights immediately upon lapse of a required certificate, and the district must dismiss that teacher or face a state aid penalty if it employs an uncertified teacher.)

7. Changes to Involuntary Leaves

The Tenure Act has always allowed renewal of *voluntary* leaves of absences for tenured teachers. It has not provided for renewal of *involuntary* or forced leaves of absence, however, due to the involuntary nature of the leave and the Tenure Act's right to continuous employment absent the district providing reasonable and just cause. HB 4625 retains the requirement that involuntary leaves not exceed one

year, but would allow them to be renewed at the will of the board. Further, the board would be allowed to require the teacher returning from an involuntary leave to furnish verification "acceptable to the board" of the teacher's ability to return. The proposed procedure invites abuse, particularly if there is no further hearing for renewed years of forced leaves and if a district has sole discretion as to what constitutes acceptable verification of fitness, again with no further review. This amendment is undoubtedly a reaction to the Mary Ruth Clark case, which has not been correctly reported by commentators before the House Education Committee. For that reason, the Clark case is fully explained below.

8. Mutual Consent

HB 4527 would allow a district to place a teacher on an indefinite unpaid suspension in the case of a recall, layoff or elimination of a position if the principal and teacher do not mutually consent to a teacher's placement. The Commission is concerned with the serious potential for abuse that could result from this proposed requirement.

9. Extension of Allowable Demotions

HB 4626 would extend the length of demotions allowed without due process from the current 3 days to 15 consecutive days and up to 30 days in a year. That large of an increase would be a hardship for many teachers. The Commission recommends no more than a 10 day demotion, which is comparable to the length of a suspension for a student before formal due process protections must be offered.

Suggestions for Tenure Reform

1. Shorten the 90 day timeline for hearing to 60 days from receipt of the district's answer, unless good cause is shown for an extension. Provide that if a district fails to file an answer within the 10-day timeline, it forfeits its right to file an answer. Shorten the timeline for attorneys' briefs to be filed from 50 days to 25 days.

2. Coordinate the tenure performance evaluation requirements with School Code requirements for performance evaluations (MCL 380.1249) so that school districts are only required to do one comprehensive evaluation.

3. Make acquisition of tenure dependent on criteria under the combined evaluation of current § 1249 and the current tenure performance evaluation (including classroom observations, and a year-end evaluation based on achieving goals set forth in an individualized development plan), rather than simply on the number of years served.

4. Extend allowable demotions from 3 days to 10 days.

5. Amend the definition of "demotion" to allow for the concept of merit pay.

6. Include incentives for districts to do the performance evaluation.

7. Require annual evaluations for all teachers and administrators.

8. Create a rebuttable presumption of reasonable and just cause for discharge of a teacher who has been found to be ineffective for three consecutive years, thereby satisfying due process concerns by providing an opportunity for a hearing while requiring the teacher to provide evidence rebutting the presumption.

Summary of Tenure Cases cited in the House Education Committee Hearings

Several cases involving the discipline of tenured teachers have been the subject of discussion before the House Education Committee hearings on the tenure reform bills. Because these cases were cited in support of the House bills and will likely be presented to this Committee also, we appreciate this opportunity to respond so that the Committee gets a fair picture of those cases.

The case of Mary Ruth Clark, a Swartz Creek teacher, has been the subject of considerable testimony critical of the Tenure Commission's decisions. It is important to point out, however, that the Commission's decisions in the Clark case have been reviewed by three panels of the Michigan Court of Appeals and by the Michigan Supreme Court three times. Each time, the courts have denied leave to appeal by the district. The Court of Appeals has stated repeatedly that it found no merit in the school district's challenges, and the Supreme Court has three times summarily denied appeal from the Court of Appeals decisions.

Although the procedural history of the Clark case became very involved because of the school district's repeated requests for judicial review and because of the school district's failure to follow the Commission's decisions, the basic facts are fairly simple. The school district had concerns about Mrs. Clark's mental health in 2007 and, in August 2007, it placed her on an involuntary leave of absence for one year. Such leaves are allowed under the Teachers' Tenure Act. Mrs. Clark filed an appeal with the Tenure Commission. The Commission denied her claim of appeal, finding that the district had reason to place her on the one-year involuntary leave.

When the district did not re-employ her in August 2008, however, Mrs. Clark filed another claim of appeal. In rulings in January and June of 2009, the Commission agreed with Mrs. Clark that the district should have taken some action in August 2008 since the Tenure Act only allows a district to place a teacher on involuntary leave for one year. The Commission clearly stated that the options open to the district in August 2008 were: 1) re-employ Mrs. Clark, 2) file tenure charges against her, 3) lay her off due to a necessary reduction in personnel, or 4) grant her a voluntary leave of absence. Since Mrs. Clark did not request a leave of absence, and since no layoffs were happening, the district had to decide whether to re-employ Mrs. Clark or to file tenure charges against her in August 2008. The Commission recognized that the district could charge Mrs. Clark with incompetence based on a showing that she was not currently mentally fit to teach. However, the district had not filed a tenure charge against Mrs. Clark alleging unfitness. Instead, the district had required Mrs. Clark to provide evidence that she was fit to teach. The Commission clearly told the district that that did not satisfy its obligation to take one of four allowed actions at the end of an involuntary leave. To hold otherwise would allow a district to keep a teacher on involuntary leave indefinitely, which would be unreasonable, unfair to both the teacher and the school community, and in clear violation of the Tenure Act. The Commission therefore ordered that Mrs. Clark be reinstated unless the district filed charges against her and suspended her in compliance with the Tenure Act.

Following those two decisions, however, the school district did not file proper tenure charges against Mrs. Clark but instead asked for leave to appeal to the Court of Appeals and Supreme Court. As noted above, the appellate courts denied the district's several requests.

The Commission considered the rights and responsibilities of the parties in the Clark case for the fourth time when Mrs. Clark challenged the school board's February 2009 decision to discharge her. The charge filed against Mrs. Clark at that time was not that she was unfit to teach, but that she had not proved that she was fit to return to work. Echoing its earlier decisions, the Commission again noted that the school district could possibly establish reasonable and just cause to discharge Mrs. Clark if it proved that she was currently unfit to teach. The key points, however, were that current fitness was at issue, and that it is always the burden of the school district to prove a tenured teacher's unfitness. Numerous decisions of the Michigan Court of Appeals and the Michigan Supreme Court have held that the school board, and not the teacher, bears the burden of proof in the discharge of a tenured teacher. Because the district had not charged Mrs. Clark with incompetence or presented current evidence concerning her fitness to teach, it did not provide reasonable and just cause to discharge her. The Commission therefore granted Mrs. Clark's claim of appeal on October 20, 2009.

Still, the school district did not file a charge of incompetence against Mrs. Clark but instead asked the Court of Appeals and Supreme Court to review the Commission's decision. For the third time, the courts refused to review the case.

To this day, the Commission has not been presented with a charge of incompetence against Mrs. Clark. Thus, the Commission informed the district from the outset what the law requires. The legal fees the district has incurred to date are due to its failure to comply with the legal requirements, its filing of numerous appeals and the mounting back pay responsibility due the teacher because of the district's failure to discharge her, despite the fact that the district testified before this Committee that she was not fit to teach.

Another case that has been the subject of previous testimony involved Millington Community Schools teacher Linda Giffels. The charge against Ms. Giffels concerned her submission of altered meal receipts to support a \$12.00 claim for reimbursement following attendance at a school-related conference. The State Tenure Commission decided that discharge was too severe a penalty in Ms. Giffels' case. The Commission recognized that Ms. Giffels' offense was serious, but found that her misconduct was an isolated incident in a 30 year teaching career. That isolated incident did not directly involve her classroom performance or her interactions with students. The only evidence concerning her teaching performance was positive. The most recent evaluation by her school principal, for example, described her as an "excellent," "remarkable," and "wonderful" teacher and a "valuable member" of the staff who was always available to help students. Three years earlier, her principal had described her as caring and cooperative, and noted that she had helped many at-risk students. There was no evidence that cast even the slightest doubt on the evidence of her success as a teacher, and the district presented no evidence that the misconduct was likely to happen again. After careful consideration of all the evidence, the Commission suspended Ms. Giffels without pay for over one year. That is, although the Commission did not find reasonable and

just cause for discharge, it imposed a very serious level of discipline. The school district appealed to the Court of Appeals. The Court of Appeals reviewed the district's many arguments about the appropriate level of discipline. The Court affirmed the Commission's decision, finding that it was supported by substantial evidence.

Other tenure cases mentioned in testimony to the Committee included the recent case of Glynis Flowers, a tenured teacher in Detroit Public Schools, and the 2003 case of Clarence Davis, a tenured teacher in Jackson Public Schools. In the Flowers case, the local board voted to discharge the teacher, and the teacher appealed to the Tenure Commission. There was a hearing before an administrative law judge, who found that the teacher's misconduct (using a school computer as security for a \$60 loan to buy a car tire to replace a flat tire) did not merit discharge but only a suspension without pay for 15 school days. It is important to emphasize, however, that that case was never reviewed by the State Tenure Commission since neither the school district nor the teacher filed exceptions to the administrative law judge's decision. It is impossible to know how the State Tenure Commission would have resolved a challenge to the administrative law judge's decision about the level of discipline in the Flowers case because it never had the opportunity to do so.

In the 2003 Davis case, the local board voted to proceed on six charges against the teacher and to discharge him. The teacher appealed and there was a hearing before an administrative law judge, who found that the district proved only three of the six charges. The ALJ determined that a penalty of a suspension without pay from October 2003 to the start of the 2004-2005 school year was an appropriate discipline. The teacher filed exceptions with the State Tenure Commission challenging the discipline. Under the Tenure Act, the school district could also have filed exceptions, but it chose not to do so. In fact, the school district expressly indicated its agreement with the ALJ's decision by filing a statement in support of the decision. Thus, the only reasonable conclusion is that the school district believed that the ALJ's decision about the appropriate level of discipline was reasonable in Davis.

A final case about which there has been much discussion and on which the Commission would like to comment is Szopo v Richmond Community Schools Board of Education, a case decided by the Commission in 1994. The teacher in that case was charged with three incidents of using unreasonable force and with one incident of threatening a student with a pocket knife. (In response to a student sticking out his tongue at the teacher during class, the teacher took out his pocket knife and threatened to cut off the student's tongue if he did it again.) The local board members found that the first three charges were not proved but, by a vote of 5 to 2, they decided to discharge the teacher based on the fourth charge. The two dissenting board members would only have suspended the teacher for three semesters. The teacher appealed to the Tenure Commission, which, by a vote of three to one, imposed a long suspension—from November 1994 to the beginning of the second semester of the 1995-1996 school year. The dissenting commissioner would have discharged the teacher. Thus, both the local board and the Commission struggled in determining the appropriate penalty as neither body was able to achieve unanimity in its decision on the issue.

The facts upon which the majority of the commissioners based their decision in Szopo included the teacher's 22 ½ years as a elementary school teacher in the

district with no prior discipline regarding physical force or misconduct involving students. In fact, the only prior discipline had involved the teacher talking with other teachers on the school playground. In addition, the teacher had been rated very effective in all categories of instruction and classroom management by his principal. That principal had also determined that the teacher's intent during the knife incident "seemed harmless" and that immediate suspension was not required. The evidence did not show that the student in question had been frightened by the teacher's actions. On the contrary, the evidence showed that he had not taken the teacher's threat seriously as evidenced by the fact that he continued to stick out his tongue at the teacher after the incident in question. The teacher admitted that he had made a mistake, but the Commission majority concluded that discharging him after a long teaching history marred only by this one error of judgment was excessive. They also noted that, in deciding to discharge the teacher, the local board majority may have been influenced by evidence that did not support the proven charge. The Ingham County Circuit Court affirmed the Commission's decision on appeal.

Thus, it is clear in Szopo that the Commission recognized that the teacher's behavior was inappropriate, it seriously considered all relevant factors in this case and it came up with a reasonable resolution that even two of the local board members preferred. In reaching its decision in this case, the Commission set forth factors for consideration to assist in determining the proper level of a penalty. These factors have become a guidepost in subsequent cases to help determine the proper level of discipline in a fair and consistent manner.

Conclusion

Finally, it has been our observation while serving on the Commission that districts that regularly evaluate their teachers and document any shortcomings are successful before the Commission. A teacher is entitled to due process before being discharged and that is the primary purpose of the Tenure Act. Arbitration is not a substitute for tenure. While arbitrators are experts at interpreting collective bargaining agreements, they may not be experts in interpreting tenure law. Rather than having hundreds of differing interpretations made by arbitrators' decisions, which have no precedential value, the body of tenure law provides one consistent interpretation of the law statewide.

As the school board attorneys stated before the House Education Committee, districts rely on this guidance from Tenure Commission precedent. We fear that if there was no tenure remedy, in many cases disputes would result in court suits, which would be far more costly and consume far more time than the tenure process. We ask that this Committee carefully consider the due process concerns that have been raised, because it is ultimately school districts that will face the expense of defending the constitutionality of the new provisions before the appellate courts.

We are grateful for this opportunity to provide our thoughts on the tenure reform process. The Commission and its staff are available to provide any assistance this Committee may require in the tenure reform process.

